

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of the)	
Telecommunications Act of 1996)	
)	CC Docket No. 96-238
Amendment of Rules Governing)	
Procedures to Be Followed When)	
Formal Complaints Are Filed Against)	
Common Carriers)	

REPORT AND ORDER

Adopted: November 25, 1997

Released: November 25, 1997

By the Commission:

TABLE OF CONTENTS

<u>Subject</u>	<u>Paragraph</u>
I. Introduction	1
II. Background	7
A. Statutory Framework for Complaints Against Common Carriers	7
B. Complaint Provisions Amended and Added by the 1996 Act	9
III. Amendments to Rules of Practice and Procedure	20
A. Overview	20
B. Applicability of the Rules	25
1. Uniform Application of the Rules	25
2. Applicability of the Section 208(b)(1) Deadline	32
C. Pre-filing Procedures and Activities	38
1. Certification of Settlement Attempts	39
2. Neutral Industry Committee	43
3. Additional Commenters' Suggestions	46
D. Service	49
1. Personal Service of Formal Complaints on Defendants	50
2. Expediting Service Generally	59

E.	Format and Content Requirements	69
1.	Support and Documentation of Pleadings	72
2.	Waivers for Good Cause Shown	93
F.	Answers	98
1.	Reduction of Time to File Answers	98
G.	Discovery	101
1.	Permissible Requests for Discovery	102
2.	Reduction of Administrative Burden of Filing Documents	126
3.	Voluntary Agreements for the Recovery of Discovery Costs	130
4.	Referral of Factual Disputes to Administrative Law Judges	133
H.	Status Conferences	139
1.	The Initial Status Conference	140
2.	Status Conference Rulings	146
I.	Cease Orders, Cease-and-Desist Orders and Other Forms of Interim Relief	153
1.	Cease and Cease and Desist Orders Under Title II of the Act and Other Forms of Interim Relief	154
2.	Legal and Evidentiary Standards	161
J.	Damages	171
1.	Bifurcation by the Commission and the Supplemental Complaint Process	171
2.	Detailed Computation of Damages	187
3.	Ending Adjudication with a Determination of the Sufficiency of a Damages Calculation Method	192
4.	Settlement Period	196
5.	Referral of Damages Issues	200
6.	Deposit of Funds into an Escrow Account	203
7.	Additional Suggestions from Commenters	209
K.	Cross-Complaints and Counterclaims	214
L.	Replies	220
M.	Motions	225
1.	The Filing of Motions	226
2.	Oppositions to Motions	230
3.	Format, Content, and Specifications of Motions and Orders	235
4.	Amendments to Complaints	241
5.	Additional Suggestions from Commenters	244
N.	Confidential or Proprietary Information and Materials	251
O.	Other Required Submissions	256
1.	Joint Statement of Stipulated Facts	256
2.	Briefs	261
3.	Commenters' Additional Suggestions	272
P.	Sanctions	275
Q.	Other Matters	279
1.	Section 271	280
2.	Sections 260, 274, and 275 of the Act	285
a.	<i>Prima Facie Claim</i>	286

competition will ensure that the American public derives the full benefit of such competition through new and better products and services at affordable rates.

2. We conclude that, in order to fulfill the goals and meet the statutory deadlines of the 1996 Act, we must revise our formal complaint rules to provide a forum for prompt resolution of all complaints of unreasonably discriminatory or otherwise unlawful conduct by telecommunications carriers, and thus to reduce impediments to robust competition in all telecommunications markets. Consistent with the Congressional mandate to expedite the processing of formal complaints, on November 26, 1996, the Commission released a *Notice of Proposed Rulemaking* ("Notice")⁶ proposing changes to the rules that govern formal complaints against common carriers.⁷ In the *Notice* we articulated our goal of expediting the resolution of all formal complaints, not just those enumerated in the 1996 Act. The *Notice* sought public comment on comprehensive rule changes and additions that would: (1) encourage parties to attempt to settle their disputes before filing formal complaints; (2) facilitate the filing and service of complaints and related pleadings; (3) improve the content and utility of the initial pleadings filed by both parties, while reducing reliance on discovery and subsequent pleading opportunities; and (4) eliminate unnecessary or redundant pleadings and other procedural devices.

3. In this *Report and Order*, we adopt certain of the proposed rules, with some modifications. The amended rules will foster our ability to meet the statutory complaint resolution deadlines of the 1996

⁶ *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Notice of Proposed Rulemaking, 11 FCC Rcd 20823 (1996).

⁷ This proceeding is one of a series of rulemakings designed to implement the provisions of the 1996 Act. See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) ("*Iowa Utils. Bd.*"), *Order on Reconsideration*, 11 FCC Rcd. 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd. 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, FCC 97-295 (rel. Aug. 18, 1997), *further recon pending*, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Notice of Proposed Rulemaking, 11 FCC Rcd 3046 (1996) ("*BOC In-Region NPRM*"); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) ("*BOC In-Region Order*"); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Report and Order, 11 FCC Rcd. 9564 (1996); *Implementation of the Telecommunications Act of 1996; Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, Notice of Proposed Rulemaking, 11 FCC Rcd 18959 (1996) ("*Section 260, 274, 275 NPRM*"); *Implementation of the Telecommunications Act of 1996; Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5361 (1997) ("*Section 260, 274, 275 First Report and Order*"); *Implementation of the Telecommunications Act of 1996; Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, Second Report and Order, 12 FCC Rcd 3824 (1997) ("*Section 260, 274, 275 Second Report and Order*"); and *Implementation of Section 255 of the Telecommunications Act of 1996*, Notice of Inquiry, 11 FCC Rcd. 19152 (1996) ("*Section 255 NOI*").

b.	Shifting the Burden of Proof to Defendant Carriers in Complaints Alleging Violations of Sections 260, 274, and 275 of the Act	291
IV.	Conclusion	298
V.	Procedural Matters	299
A.	Petitions for Reconsideration and <i>Ex Parte</i> Presentations	299
B.	Paperwork Reduction Act Analysis	302
C.	Final Regulatory Flexibility Analysis	303
VI.	Ordering Clauses	342
VII.	Appendices	
A.	Rules Adopted by This <i>Report and Order</i>	
B.	Formal Complaint Intake Form	
C.	List of Parties Filing Comments	
D.	List of Parties Filing Replies	

I. INTRODUCTION

1. In February 1996, Congress passed and the President signed the Telecommunications Act of 1996 ("1996 Act").¹ One of the main goals of the 1996 Act is to establish a "pro-competitive, deregulatory" national policy framework for the telecommunications industry.² In accordance with this goal, Sections 208, 260, 271, and 275 of the Act contain deadlines ranging from ninety days to five months for the Commission's resolution of certain complaints filed against the Bell Operating Companies³ ("BOCs"), local exchange carriers ("LECs"), and other telecommunications carriers that are subject to the requirements of the Act.⁴ Provisions of the 1996 Act further direct the Commission to establish such procedures as are necessary for the review and resolution of such complaints within the statutory deadlines.⁵ Prompt and effective enforcement of the Act and the Commission's rules is crucial to attaining the 1996 Act's goals of full and fair competition in all telecommunications markets. Such widespread

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 *codified at* 47 U.S.C. §§ 151 *et seq.* (1996). Where appropriate, we will cite to the 1996 Act throughout this *Report and Order* as it is codified in the U.S. Code. The Communications Act of 1934, as amended, including the 1996 Act amendments, *codified at* 47 U.S.C. § 151 *et seq.*, is referred to herein as the "Act."

² See Joint Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996) ("*Joint Explanatory Statement*").

³ See 47 U.S.C. § 153(4), which defines "Bell Operating Company."

⁴ See 47 U.S.C. §§ 208(b)(1), 260(b), 271(d)(6)(B), and 275 (c). Each of these provisions is discussed in more detail below.

⁵ See, e.g., 47 U.S.C. § 271(d)(6)(B) stating that the "Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph 3."

Act and expedite the resolution of all formal complaints, while safeguarding the due process interests of affected parties. The rules we adopt today apply to all formal complaints, except complaints alleging violations of Section 255.⁸ A uniform approach will ensure that the Commission places on all formal complaints the same pro-competitive emphasis underlying the 1996 Act's complaint resolution deadlines. The rules we adopt in this *Report and Order* shall be important tools for promptly assessing a common carrier's compliance with the requirements of the Act and our rules. In addition, these rules provide for suitable remedial actions where appropriate.

4. We intend to closely monitor the effectiveness of our new streamlined rules in promoting the pro-competitive goals of the Act. We will not hesitate to re-visit the rules and policies adopted in this Report and Order if we later determine that further modifications are needed to ensure that complaint proceedings are promptly and fairly resolved and, more generally, to promote the Act's goal of full and fair competition in all telecommunications markets.

5. In addition, Commission staff retains considerable discretion under the new rules to, and is indeed encouraged to, explore and use alternative approaches to complaint adjudication designed to ensure the prompt discovery of relevant information and the full and fair resolution of disputes in the most expeditious manner possible. We recently established an Enforcement Task Force, the principal mission of which is to promote timely and appropriate enforcement of the pro-competitive policies of the 1996 Act.⁹ Among other duties, the Enforcement Task Force has been charged with identifying and investigating actions by common carriers that may be hindering competition in telecommunications markets and with initiating enforcement actions where necessary to remedy conduct that is unreasonable, anti-competitive or otherwise harmful to consumers.¹⁰ The Enforcement Task Force is considering whether to recommend alternative forms of complaint adjudications and enforcement actions to ensure that the goals underlying the pro-competitive policies of the 1996 Act and the Commission's implementing rules and orders are met.¹¹ Any such recommendation may form the basis for a subsequent Report and Order to be considered by the Commission at a later date.

6. Finally, we note that Section 207 of the Act gives any person the option of pursuing claims for damages against common carriers based on alleged violations of the Act either at the Commission or before a federal district court of competent jurisdiction.¹² Thus, parties looking to recover

⁸ Section 255 governs access to telecommunications equipment and services by persons with disabilities. 47 U.S.C. § 255. The Commission released a Notice of Inquiry seeking comment on the implementation of Section 255 and on enforcement issues, including potential complaint procedures. See *Section 255 NOI*.

⁹ See "FCC Creates Local Competition Enforcement Task Force," News Release (July 15, 1997).

¹⁰ See "FCC Creates Local Competition Enforcement Task Force," News Release (July 15, 1997).

¹¹ Separate enforcement actions could include, for example, forfeiture actions under Section 503 of the Act and show cause proceedings under Section 312 of the Act. See 47 U.S.C. §§ 503, 312.

¹² 47 U.S.C. § 207. The section further provides that "such person shall not have the right to pursue both such remedies." *Id.*

monetary damages are free to weigh the advantages of bringing their claims before a federal district court against the benefits of proceeding under the Commission's expedited complaint procedures.¹³

II. BACKGROUND

A. Statutory Framework for Complaints Against Common Carriers

7. Prior to enactment of the 1996 Act, Sections 206 to 209 of the Act¹⁴ provided the statutory framework for our rules for resolving formal complaints filed against common carriers.¹⁵ Section 206 of the Act establishes the liability of a common carrier for damages sustained by any person or persons as a consequence of that carrier's violation of any provision of the Act. Section 207 of the Act permits any person claiming to be damaged by the actions of any common carrier either to make a complaint to the Commission or bring suit in federal district court for the recovery of such damages. Section 208(a) authorizes complaints by any person "complaining of anything done or omitted to be done by any common carrier" subject to the provisions of the Act.¹⁶ Section 208(a) specifically states that "it shall be the duty

¹³ For example, parties to district court proceedings have a full panoply of trial-type discovery tools that are unworkable, and, therefore, not permitted, under our fact-pleading rules. As the Commission emphasized in promulgating discovery rules in 1988:

[U]sing the full panoply of trial-type discovery tools similar to the Federal Rules of Civil Procedure in formal complaint proceedings would be ill-advised; the nature of the proceedings are essentially different. Litigation under the Federal Rules relies on notice pleading to raise issues on a wide variety of subjects. Facts are fleshed out in lengthy, complex, time-consuming and costly discovery, culminating in a trial if the suit is not settled or disposed of on summary judgment. Formal complaints, on the other hand, are limited to specific common carrier violations within this Commission's special expertise and often are resolved solely on the pleadings to save both time and costs.

Amendment of Rules Governing Procedures to be Followed When Complaints are Filed Against Common Carriers, Report and Order, 3 FCC Rcd. 1806, 1810 (1988). See *American Message Center v. F.C.C.*, 50 F.3d 35, 40-41 (D.C. Cir. 1995) (the court acknowledged that the Commission may properly place limitations, that do not exist in trials governed by the Federal Rules, on the scope and methods of discovery in its formal complaint proceedings).

¹⁴ 47 U.S.C. §§ 206-209.

¹⁵ In addition, Section 415 of the Act generally prescribes a two-year statute of limitations on the recovery of damages or overcharges against a common carrier. Subject to limited exceptions, any complaint for recovery of damages must be filed within two years from the time the cause of action accrues. 47 U.S.C. § 415(b) and (c).

¹⁶ Section 208 was derived from Section 13 of the original Interstate Commerce Act of 1887. See I. Sharfman, *The Interstate Commerce Commission*, Vol. I, 17-19, Vol. IV, 170, 230 (1931). This legislation grew out of the Granger movement's drive to give "to agriculture relief from discriminatory and excessive charges in the transportation and handling of produce." Felix Frankfurter, *The Commerce Clause* 83 (1936). The legislation was declaratory of and codified existing common law obligations of railroads as common carriers so that they could not exercise their powers arbitrarily. See *American Trucking v. Atchison T&S F.R. Co.*, 387 U.S. 397, 406 (1967).

of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."¹⁷ Section 209 of the Act specifies that, if "the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."¹⁸

8. In 1988, Congress added subsection 208(b) to require that complaints filed with the Commission concerning the lawfulness of a common carrier's charges, practices, classifications or regulations, must be resolved by the Commission in a final, appealable order within twelve months from the date filed, or fifteen months from the date filed if "the investigation raises questions of fact of . . . extraordinary complexity."¹⁹ In addition, Congress amended subsection 5(c)(1) to require that such decisions be made by the Commission, not the Bureau staff pursuant to delegated authority.²⁰

B. Complaint Provisions Amended and Added by the 1996 Act

9. As amended or added by the 1996 Act, Sections 208, 260, 271, and 275 of the Act all contain deadlines for the Commission's resolution of formal complaints alleging violations under the particular section by a common carrier.²¹

¹⁷ 47 U.S.C. § 208(a).

¹⁸ 47 U.S.C. § 209. Under Section 207, any person "claiming to be damaged" by a carrier's violation of the Act has a choice of filing a complaint with the Commission or in federal district court, but not in both fora. 47 U.S.C. § 207.

¹⁹ 47 U.S.C. § 208(b)(1). See Federal Communications Commission Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021 (Nov. 3, 1988) ("FCCAA").

²⁰ Section 5(c)(1) states:

When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and . . . except any action referred to in sections 204(a)(2), 208(b), and 405(b)) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee.

47 U.S.C. § 5(c)(1). See also, e.g., 47 C.F.R. §§ 0.91(a) and 0.291 (Common Carrier Bureau); 47 C.F.R. §§ 0.131(a) and 0.331(a)(2) (Wireless Telecommunications Bureau); 47 C.F.R. §§ 0.51(d) and 0.261(a)(15), (b)(1)(i) - (iii) (International Bureau). Throughout this *Report and Order*, unless otherwise indicated, "staff" shall refer to the staff of the Commission.

²¹ 47 U.S.C. §§ 208(b), 271(d), 260, 275.

10. *Section 208.* The 1996 Act amended Section 208, entitled "Complaints to the Commission."²² Section 208(b)(1) now mandates that "the Commission shall, with respect to any investigation under [Section 208(b)] of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed," rather than the twelve to fifteen month deadline previously imposed.²³ In addition, subsection 208(b)(2) provides that any such investigation initiated prior to enactment of subsection 208(b)(2) must be concluded within twelve months after the date of enactment.²⁴

11. *Section 260.* The 1996 Act added Section 260, entitled "Provision of Telemessaging Service."²⁵ Section 260(b) provides that:

[t]he Commission shall establish procedures for the receipt and review of complaints concerning violations of [Section 260(a)] or the regulations thereunder that result in material financial harm to a provider of telemessaging service. Such procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, the Commission shall, within 60 days after receipt of the complaint, order the local exchange carrier and any affiliates to cease engaging in such violation pending such final determination.²⁶

12. *Section 271.* The 1996 Act added Section 271, entitled "Bell Operating Company Entry into InterLATA Services."²⁷ Section 271(d)(6)(B) directs the Commission to "establish procedures for the review of complaints concerning failures by [BOCs] to meet conditions required for approval" under Section 271(d)(3) to provide in-region interLATA services.²⁸ Section 271(d)(6)(B) further provides that, "[u]nless the parties otherwise agree, the Commission shall act on such complaint within 90 days."²⁹

13. *Section 275.* The 1996 Act added Section 275, entitled "Alarm Monitoring Services."³⁰ Section 275(c) requires the Commission to "establish procedures for the receipt and review of complaints

²² 47 U.S.C. § 208.

²³ 47 U.S.C. § 208(b).

²⁴ 47 U.S.C. § 208(b)(2).

²⁵ 47 U.S.C. § 260.

²⁶ 47 U.S.C. § 260(b).

²⁷ 47 U.S.C. § 271.

²⁸ 47 U.S.C. § 271(d)(6)(B).

²⁹ 47 U.S.C. § 271(d)(6)(B).

³⁰ 47 U.S.C. § 275.

concerning violations of [Section 275(b)] or the regulations thereunder that result in material financial harm to a provider of alarm monitoring service."³¹ Section 275(c) further provides that:

[s]uch procedures shall ensure that the Commission will make a final determination with respect to any such complaint within 120 days after receipt of the complaint. If the complaint contains an appropriate showing that the alleged violation occurred, . . . the Commission shall, within 60 days after receipt of the complaint, order the incumbent local exchange carrier . . . and its affiliates to cease engaging in such violation pending such final determination.³²

14. The 1996 Act also added several provisions that reference complaint proceedings but do not contain resolution deadlines.

15. *Section 255.* The 1996 Act added Section 255, entitled "Access by Persons with Disabilities."³³ Section 255 requires manufacturers of telecommunications equipment or customer premises equipment to ensure that the equipment is "designed, developed, and fabricated to be accessible to and usable by individuals with disabilities"³⁴ and further requires any providers of telecommunications services to "ensure that the service is accessible to and usable by individuals with disabilities."³⁵ Section 255 provides that "[t]he Commission shall have exclusive jurisdiction with respect to any complaint under this section" but imposes no specific resolution deadline for such complaints.³⁶ We have initiated a separate proceeding to implement the provisions of Section 255.³⁷

16. *Section 274.* The 1996 Act added Section 274, entitled "Electronic Publishing by Bell Operating Companies."³⁸ Section 274(e)(1) provides that "any person claiming that an act or practice of

³¹ 47 U.S.C. § 275(c).

³² 47 U.S.C. § 275(c).

³³ 47 U.S.C. § 255.

³⁴ 47 U.S.C. § 255(b). The term "disability" is defined in subsection 255(a) as having the "meaning given to it by section 3(2)(A) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102(2)(A))." 47 U.S.C. § 255(a)(1). "Readily achievable" is defined in subsection 255(a) as having the meaning given to it by section 301(9) of that Act (42 U.S.C. § 12181(9))." 47 U.S.C. § 255(a)(2).

³⁵ 47 U.S.C. § 255(c).

³⁶ 47 U.S.C. § 255(f). In limiting the remedies available under this Section, subsection 255(f) specifically excludes "any private right of action to enforce any requirement of the section or any regulation thereunder." Thus, a complaint filed with the Commission is the sole relief mechanism available to parties claiming a violation of Section 255.

³⁸ *ШІГІ ШІГІsFEe зЙЙ хЦУе ШІГІ ЯhSE шІГІГЕЕЕЕ7eFӘЯsFEeS ПӘs ПӘӨГSSFяFhFsI Т7FәГhFeГS fЕЖ P7SsEEГЖ пжГЕFSГS СЖ7FeEГes Яeә шІГІГЕЕЕЕ7eFӘЯsFEeS СЖ7FeEГeә хEsFӘГe йЗ сГәә чГГә ЗИкЗИ рПжӘГFsГӘs7жЯh Яeә шжЯeSeежсЯsFEe пЯжжFГЖS PEEeГFЯeӨГ пЕЯжәе ЗЛЛйДә*

³⁸ 47 U.S.C. § 274.

any [BOC], affiliate, or separated affiliate constitutes a violation of [Section 274] may file a complaint with the Commission or bring suit in federal district court as provided in Section 207 of the Act" and that a "[BOC], affiliate, or separated affiliate" shall be liable for damages as provided in Section 206 of the Act.³⁹ Similarly, subsection 274(e)(2) permits an aggrieved person to apply to the Commission for a cease-and-desist order or to a U.S. District Court for an injunction or order compelling compliance with Section 274. None of the complaint provisions in Section 274 contain deadlines for Commission action.⁴⁰

17. In addition, the 1996 Act imposed other requirements on the BOCs and other common carriers which could lead to formal complaint actions under Section 208. For example, Section 254(k), entitled "Subsidy of Competitive Service Prohibited," prohibits telecommunications carriers from using non-competitive services to subsidize services that are subject to competition.⁴¹ The 1996 Act also added Section 276, entitled "Provision of Payphone Service."⁴² Section 276(a) prohibits a BOC from subsidizing its payphone service through its telephone exchange service operations or its exchange access operations.⁴³ Timely, responsive enforcement of provisions such as these will be necessary to promote the 1996 Act's goal of fostering competitive telecommunications markets.

18. We tentatively concluded in the *Notice* that the provisions of the 1996 Act that specifically refer to complaint procedures do not diminish the Commission's broad authority to investigate formal complaints under Section 208.⁴⁴ AT&T, the sole commenter to address this issue, agrees with our tentative conclusion, explaining that Section 261(a) states that:

nothing in this part [Part II] shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.⁴⁵

³⁹ 47 U.S.C. § 274(e)(1). This section further provides, however, that "damages may not be awarded for a violation that is discovered by a compliance review as required by [Section 274(b)(7)] and corrected within 90 days." Section 274(b)(8) provides that each separated affiliate or joint venture and the BOC shall have performed annually a compliance review that is conducted by an independent entity for the purpose of determining compliance during the preceding calendar year with any provision of Section 274. *Id.* at § 274(b)(8).

⁴⁰ 47 U.S.C. at § 274.

⁴¹ *See* 47 U.S.C. § 254(k).

⁴² 47 U.S.C. § 276.

⁴³ 47 U.S.C. § 276(a)(1).

⁴⁴ *Notice* at 20827. Section 208(a) authorizes "any person, any body politic or municipal organization, or state commission," to file complaints with the Commission about "any thing done or omitted to be done" by any common carrier in contravention of the Act. The Commission is required to "investigate the matters complained of in such manner and by such means as it shall deem proper." 47 U.S.C. § 208(a).

⁴⁵ *Id.* at 2-3, citing 47 U.S.C. § 261(a).

According to AT&T, specific references in the Act to the Commission's duties to resolve formal complaints under Section 271 and elsewhere in the Act affect only the time in which such matters must be decided, but do not affect the Commission's existing authority under Section 208.⁴⁶

19. We find that Congress' actions in specifying certain complaint procedures and deadlines for those procedures do not restrict the Commission's authority to resolve formal complaints pursuant to Section 208. Section 261 is entitled, "Effect on Other Requirements" and subsection (a) indicates Congress' intent to leave intact the Commission's authority except where it would be inconsistent with the Act itself.⁴⁷ We conclude that any references to complaint resolution deadlines in Title II of the Act are intended to affect only the time in which specific matters must be decided, and do not decrease the Commission's existing authority under Section 208.

III. AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

A. Overview

20. The focus of this proceeding is on establishing rules and procedures to implement the expedited complaint provisions set forth by the 1996 Act and to speed the resolution of all formal complaints in accordance with the pro-competitive policies underlying the 1996 Act.⁴⁸ Three objectives form the basis for the amendment of the formal complaint rules, which focus on settlement efforts, enhanced pleading content, and streamlined procedures.

21. Our first objective is to promote settlement efforts to enable parties to resolve disputes on their own before resorting to adjudication before the Commission. We conclude that more dialogue between parties prior to the complaint process will reduce, and in some cases, eliminate, the need to file formal complaints with the Commission. Consequently, we require complainants and defendant carriers to certify in their respective complaints and answers that the possibility of settlement was discussed before the complaint was filed with the Commission.⁴⁹ Certification of settlement attempts will promote pre-filing discussions and information exchanges among the disputing parties. In situations in which disputes are not resolved, we expect that pre-filing discussions and information exchanges will enable parties to

⁴⁶ AT&T Comments at 2-3.

⁴⁷ See 47 U.S.C. § 261(a).

⁴⁸ In developing these rules, the Commission conducted meetings with members of the industry, the telecommunications bar, and the public to share information, concerns, and ideas for improving the speed and effectiveness of the complaint process. The staff also examined several models of litigation efficiency, including the Federal Rules of Civil Procedure and the expedited procedures utilized in the U.S. District Court for the Eastern District of Virginia. See *E.D. Va. R. 1, et. seq.* The system for expedited disposition of civil litigation in the Eastern District of Virginia is popularly known as the "rocket docket." "The Eastern District of Virginia has consistently been the fastest and most efficient judicial district in the federal court system . . . [T]he mean time from filing of an answer to the trial is only seven months, less than half the national average of eighteen months." George F. Pappas and Robert G. Sterne, *Patent Litigation in the Eastern District of Virginia*, 35 IDEA: J.L. & Tech. 361, 363 (1995).

⁴⁹ See Appendix A, §§ 1.721(a)(8), 1.724(h).

narrow the number and scope of the issues to be presented to the Commission for resolution under the expedited complaint procedures.

22. Our second objective is to improve the utility and content of pleadings, so that the complaint, answer, and any necessary reply may serve as the principal basis upon which the Commission will make a decision on the merits of the complaint. Under the format and content rules, absent a waiver for good cause shown, complainants and defendants must make factual allegations in their pleadings and supply documentation to support such facts. To the extent that the Commission determines that additional information is needed in the record to resolve a complaint fully, the parties will be required to respond quickly.

23. Our third objective is to streamline the formal complaint process by eliminating or limiting procedural devices and pleading opportunities that have contributed to undue delays in formal complaints. For example, we conclude that we should modify discovery to increase staff control over the process⁵⁰ and limit the filing, timing, and scope of briefs,⁵¹ as well as streamline the service process by having complainants serve complaints directly on defendants.⁵² In addition, we eliminate certain pleading opportunities that have been of little value to the complaint resolution process, including cross-complaints, counterclaims, motions to make a complaint definite and certain, and amendments to complaints.⁵³

24. To advance these three objectives, we have designed rules to speed the processing of all formal complaints. By encouraging dialogue among the parties prior to the filing of formal complaints, many conflicts will be settled and those complaints that are filed will have been narrowed in scope. By requiring initial pleadings to contain complete information and documentation, the parties and the Commission will be better prepared to resolve disputed issues at an early stage of the complaint process. And finally, by streamlining and eliminating unnecessary pleading opportunities, the parties and the Commission will be able to focus early on the essential activities and information needed to more quickly resolve formal complaints.

B. Applicability of the Rules

1. Uniform Application of the Rules

a. The Notice

25. In the *Notice*, we tentatively concluded that the pro-competitive goals and policies underlying the short complaint resolution deadlines in the Act should apply to all formal complaints, not just to those specifically added or amended by the 1996 Act.⁵⁴ The *Notice* proposed to implement uniform

⁵⁰ See Appendix A, § 1.729(a).

⁵¹ See Appendix A, § 1.732(b) - (f).

⁵² See Appendix A, § 1.735(d).

⁵³ See Appendix A, §§ 1.725, 1.727.

⁵⁴ *Notice* at 20825.

procedures and pleading requirements to expedite the resolution of all formal complaints and sought comment on the need for specialized rules or procedures for handling complaints arising under particular provisions of the Act.⁵⁵

b. Comments

26. BellSouth supports applying the same procedures to all formal complaints⁵⁶ and the National Association for the Deaf ("NAD") agrees, stating that separate sets of procedures could be confusing for complainants.⁵⁷ The majority of parties commenting on this issue, however, argue for special expedited procedures for those complaints that are subject to specific statutory deadlines, with other complaints proceeding under more relaxed or flexible timetables.⁵⁸ APCC expresses concern that the new procedures will place significant burdens on complainants and defendants.⁵⁹ CBT states that Sections 260(b), 271(d)(6)(B), and 275(c), which require complaints to be resolved under ninety or 120-day deadlines, involve very specialized subject matters, while Section 208 complaints may involve any aspect of telecommunications and therefore parties to Section 208 complaints may need more time to develop and resolve issues.⁶⁰ GTE suggests using separate proceedings for "fast-track" cases, stating that the Commission should wait until it has gained more experience with application of the provisions of the 1996 Act before attempting to apply the same expedited procedures to all formal complaints.⁶¹

27. Some commenters also urge the Commission to establish expedited procedures for those complaints that are not specifically covered by a statutory deadline but which, they argue, are needed to ensure full and fair competition.⁶² For example, MCI proposes expedited procedures for interconnection-related complaints pursuant to Sections 251 and 252 of the Act.⁶³ TRA argues that complaints filed by resale carriers should be processed under expedited procedures because of the size and resource disparities

⁵⁵ Notice at 20825.

⁵⁶ BellSouth Comments at 2.

⁵⁷ NAD Reply Comments at 2.

⁵⁸ See, e.g., American Public Communications Council ("APCC") Comments at 7; Cincinnati Bell Telephone ("CBT") Comments at 4.

⁵⁹ APCC Comments at 7.

⁶⁰ CBT Comments at 4.

⁶¹ GTE Reply Comments at 6.

⁶² See, e.g., MCI Comments at 5; Telecommunications Resellers Association ("TRA") Comments at 8.

⁶³ MCI Comments at 5.

between resellers and their underlying network service providers, and because of the unusual circumstances in which resellers have dual status as both customers and competitors of network service providers.⁶⁴

28. The NAD references its comments to the *Section 255 NOI*, in which it proposed that the Commission create procedures to coordinate with the Department of Justice ("DOJ") to determine the appropriate governmental authority for reviewing complaints that arise out of a lack of access to telecommunications services for persons with disabilities. Such complaints could result either from the failure of a place of public accommodation or state or local governmental entity to follow the requirements of the Americans with Disabilities Act of 1990 ("ADA") or from the failure of a telecommunications manufacturer or service provider to comply with Section 255.⁶⁵ The NAD states that its proposal will aid parties who file Section 255 complaints that may raise jurisdictional issues.⁶⁶

c. Discussion

29. We affirm our tentative conclusion that uniform streamlined procedures and pleading requirements should be applied to all formal complaints filed against common carriers, even those that are not subject to specific statutory deadlines, with the exception of complaints alleging violations of Section 255.⁶⁷ All formal complaints should be resolved as expeditiously as possible. We find that uniform procedures and pleading requirements will promote efficiency in the Commission's administration of complaints and will minimize confusion among the parties.⁶⁸ Uniform procedures for all formal complaints will promote the Commission's goal of expediting the resolution of these disputes by allowing the Commission and all parties to follow one set of rules.

30. We disagree with the commenters who support expedited procedures only for complaints that have statutory deadlines or that involve competitive issues for the following reasons.⁶⁹ First, we agree

⁶⁴ TRA Comments at 8.

⁶⁵ NAD Reply at 6. The NAD also notes that similar arrangements exist among the Department of Education, the Department of Health and Human Services, and the Department of Justice with respect to civil rights complaints that overlap between the ADA and the Rehabilitation Act of 1973. *Id.*

⁶⁶ For example, several parties may be liable for the improper placement of a TTY outlet in a hotel, including the hotel or the manufacturer of the payphone that utilizes that outlet. NAD Reply at 6.

⁶⁷ See, *supra*, n.37. See, generally, *Section 255 NOI*.

⁶⁸ We emphasize again that the staff retains considerable discretion to use alternative approaches and techniques designed to promote fair and expeditious resolution of complaints. For example, the staff has the discretion to require any party to submit information or pleadings that are not specifically contemplated under the amended rules if such submission will facilitate the prompt resolution of the matters in dispute.

⁶⁹ With respect to MCI's claim that specialized procedures are needed to expedite resolution of Section 208 complaints alleging violations of the interconnection provisions of Section 251, the U.S. Court of Appeals for the 8th Circuit recently held that the Commission lacks authority either to review the decisions of state commissions regarding Section 251 interconnection agreements or to enforce state-approved agreements in the context of Section 208 complaint. *Iowa Utils. Bd.*, 120 F.3d 753, 803-04. To the extent that complaints alleging violations of Section 251 fall properly within our jurisdiction, such complaints will be processed

with NAD that having separate sets of procedures for certain types of complaints would create confusion for parties who might be unclear as to which rules to follow and might even lead to repeated and inadvertent violations of our procedural rules. Second, we conclude that separate complaint procedures would permit parties to exploit our rules by alleging certain violations in order to manipulate the time frame or level of evidentiary support required in a particular complaint. For example, a complainant alleging that a BOC has violated certain provisions of the Act might be tempted to add an allegation that the BOC has also failed to meet a condition required for approval for provision of interLATA services in violation of Section 271, in order to take advantage of the ninety-day resolution deadline mandated by Section 271(d)(6)(B).⁷⁰ Third, to the extent that certain commenters contend that subjecting all complaints to expedited procedures will unnecessarily work hardships on complainants and defendants in cases without statutory deadlines,⁷¹ we note that the Commission has considerable discretion under the amended rules to accommodate the needs of parties in cases where no statutory deadline applies.⁷² Finally, separate sets of procedures would be administratively burdensome for the Commission. Not only would it be cumbersome to promulgate separate sets of procedures, but it would decrease staff efficiency to apply different procedural rules to different complaints.

31. We defer consideration of NAD's proposal to establish coordination procedures with the DOJ regarding jurisdiction of accessibility complaints in this proceeding. We will address this proposal in our Section 255 implementation rulemaking,⁷³ so as to permit the Commission to take a comprehensive approach to implementation of Section 255.

2. Applicability of the Section 208(b)(1) Deadline

a. The Notice

32. We stated in the *Notice* that the new five-month resolution deadline in Section 208(b)(1) applies only to those formal complaints that investigate the "lawfulness of a charge, classification, regulation or practice."⁷⁴ Section 208(b), as originally added by Congress in 1988 in the FCCAA,⁷⁵ has been interpreted previously as applicable only to complaints about matters contained in tariffs filed with

under the expedited procedures we adopt today for all Section 208 complaints.

⁷⁰ See 47 U.S.C. § 271(d)(6)(B).

⁷¹ See, e.g., APCC Comments at 7.

⁷² For example, the staff will be in a position to waive or relax the format and content requirements in certain cases and to grant parties more leeway conducting discovery and filing briefs for purposes of prosecuting or defending complaints.

⁷³ See Section 255 NOI.

⁷⁴ Notice at 20827.

⁷⁵ See, *supra*, n.19.

the Commission.⁷⁶ In other words, under this interpretation, only those complaints challenging the "lawfulness of a charge, classification, regulation or practice" reflected in a tariff filed with the Commission pursuant to Section 203 of the Act⁷⁷ have been viewed as subject to the resolution deadlines contained in former Section 208(b).

b. Comments

33. Several commenters take a much broader view of the scope of Section 208(b). According to these commenters, the five-month resolution deadline in Section 208(b)(1), in the absence of a specific statutory resolution deadline such as in Sections 260, 275, and 271, applies to all formal complaints filed pursuant to Section 208.⁷⁸ Although the commenters provide little argument to support this view, the crux of their claim appears to be that the language in Section 208(b)(1) referring to "investigation[s] into the lawfulness of a charge, classification, regulation or practice" is broad enough to cover any unlawful act or omission by a common carrier which could subject it to a complaint filed pursuant to Section 208.⁷⁹ Under this broad interpretation of Section 208(b)(1), the Commission would have a maximum of five months to resolve any formal complaint filed pursuant to Section 208.

c. Discussion

34. The plain language of the Act establishes that the class of complaints subject to the deadline in Section 208(b)(1) is narrower than the class of complaints that can be filed under Section 208(a). Section 208(a), *inter alia*, gives any person the right to complain about "anything done or omitted to be done" by a common carrier in contravention of the Act.⁸⁰ The complaint resolution deadline in Section 208(b)(1), on the other hand, refers only to those complaints involving investigations into the lawfulness of a "charge, classification, regulation, or practice" of a carrier.⁸¹

⁷⁶ See, e.g., Letter from Cheryl A. Tritt, Chief, Common Carrier Bureau, to Martin J. Fitzgerald, Special Assistant to the General Counsel, U.S. General Accounting Office, dated September 23, 1992, at 1. This interpretation had been previously communicated to the House Committee on Energy and Commerce 1991 by then FCC Chairman Alfred C. Sikes in November 1991. See Letter from Alfred C. Sikes, Chairman, Federal Communications Commission, to the Honorable John D. Dingell, Chairman of Committee on Energy and Commerce, U.S. House of Representatives, dated November 15, 1991.

⁷⁷ 47 U.S.C. § 203.

⁷⁸ See, e.g., Bell Atlantic Comments at 1; BellSouth Comments at 1; CBT Comments at 4; APCC Comments at 7.

⁷⁹ See, e.g., Bell Atlantic Comments at 1; BellSouth Comments at 1; CBT Comments at 4; APCC Comments at 7.

⁸⁰ 47 U.S.C. § 208(a).

⁸¹ 47 U.S.C. § 208(b)(1). We note that the language "charge, classification, regulation or practice" is also used, with slight variation, in Sections 201(b), 202(a), 203(a) and (b), and 205(a) of the Act. See 47 U.S.C. §§ 201(b), 202(a), 203(a) and (b), and 205(a).

35. While there is little guidance in Section 208 itself for defining the subset of complaints covered by Section 208(b), we conclude that Section 208(b)(1) covers complaints relating to the lawfulness of those matters required to be in tariffs. Stated another way, the deadline covers complaints relating to the lawfulness of matters with respect to which the Commission could exercise its prescription power under Section 205.⁸² The deadlines in Sections 204(a)(2)(A) (pertaining to the nature and timing of tariff investigations by the Commission)⁸³ and 208(b)(1)⁸⁴ are identical in both the Act, as amended by the FCCAA,⁸⁵ and the 1996 Act.⁸⁶ In addition, the provision in the 1996 Act establishing the effective date for the changes to the tariff investigation and complaint resolution deadlines specifically states that the new deadlines in Sections 204 and 208(b) shall apply only with respect to charges, practices, classifications, or regulations "filed" on or after one year after the date of enactment.⁸⁷ The use of the word "filed" connotes a tariff filing pursuant to Section 203 of the Act because it is generally pursuant to Section 203 that a "charge, classification, regulation, or practice" would be "filed" with the Commission.

36. We note, moreover, that the 1996 Act added specific resolution deadlines for complaints filed pursuant to Sections 260, 271, and 275. It may be inferred that, because Congress added specific deadlines in certain sections of the 1996 Act for resolving identified types of complaint actions, and was silent as to deadlines for resolving complaints arising from other sections of the Act, Congress did not intend to mandate deadlines for resolving all complaints.⁸⁸

37. We therefore conclude that Section 208(b) applies only to formal complaints which involve "investigation[s] into the lawfulness of a charge, classification, regulation or practice" contained in tariffs filed with the Commission. In light of our complete detariffing policy for the domestic interstate, interexchange services of nondominant interexchange carriers and our permissive detariffing policy for

⁸² Section 205 provides that the Commission is "authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . and what classification, regulation, or practice is or will be just fair, and reasonable . . ." 47 U.S.C. § 205.

⁸³ See 47 U.S.C. § 204(a)(2)(A).

⁸⁴ See 47 U.S.C. § 208(b)(1).

⁸⁵ See 47 U.S.C. §§ 204(a)(2)(A), 208(b)(1).

⁸⁶ 1996 Act at § 402(b)(3)-(4).

⁸⁷ 1996 Act at § 402(b)(4).

⁸⁸ While we have previously held that floor statements by members of Congress are not the most probative evidence of Congressional intent underlying a statute, it bears noting in this instance that Senator Inouye, who sponsored the amendments, stated during consideration of the amendments that the Section 208(b) resolution deadline "do[es] not apply to all complaints." According to Senator Inouye, "[c]omplaint investigations that do not concern the lawfulness of a tariff, as when a member of the public complains that a carrier has not complied with the terms of its tariffs, are not required to be completed within the twelve month deadline." Senator Inouye also expressed the view that the deadline imposed on Section 208(b)(1) complaint investigations regarding tariff-related complaints was intended to be consistent with a similar deadline placed on Section 204(a)(2)(A) tariff investigations. 134 Cong. Rec. S152287-01 (daily ed. October 8, 1988).

competitive access providers and competitive LECs,⁸⁹ however, we conclude that the interpretation should be modified to ensure that our forbearance decisions do not eviscerate Congress' intent in establishing the five-month resolution deadline for 208(b)(1) complaints. As noted above, the application of the 5-month 208(b)(1) deadline to investigations concerning a carrier's "charge, classification, regulation, or practice" is triggered by the filing of any such charge, classification, regulation or practice with the Commission.⁹⁰ To the extent that our detariffing decisions relieve carriers of any obligations to make such filings, it could be argued that complaints about matters not filed with the Commission by carriers are not encompassed by Section 208(b)(1). We conclude that Congress clearly did not intend this result. We hold, therefore, that the Section 208(b)(1) deadline shall apply to any complaint about the lawfulness of matters included in tariffs filed with the Commission, and those matters that would have been included in tariffs but for the Commission's forbearance from tariff regulation.⁹¹ For example, complaints alleging that a carrier, through its non-tariffed charges, has failed to meet the rate integration or rate averaging requirements of Section 254(g) of the Act⁹² would be subject to the Section 208(b)(1) deadline. Similarly, complaints contending that a carrier has imposed unjust and unreasonable terms and conditions on the provision of a service that would have been tariffed but for our forbearance decision would fall within the requirements of Section 208(b)(1).

C. Pre-Filing Procedures and Activities

38. In the *Notice* we asked parties to identify specific pre-filing activities available to potential complainants and defendants that could serve to settle or narrow disputes, or facilitate the compilation and exchange of relevant documentation or other information prior to the filing of a formal complaint with

⁸⁹ The Act provides the Commission with authority to forbear from applying the provisions of Title II, including tariffing provisions, subject to certain limited exceptions. See 47 U.S.C. § 160; *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Second Report and Order, 11 FCC Rcd 20730 (1996) ("*Tariff Forbearance Order*"), recon. Order on Reconsideration, FCC No. 97-293, CC Docket No. 96-61 (rel. Aug. 20, 1997) ("*Tariff Recon Order*"), stayed sub nom. *MCI Telecommunications Corp. v. FCC*, consolidated Cases 96-1459, 96-1477, 97-1009 (Feb. 13, 1997); *Hyperion Telecommunications, Inc., Petition Requesting Forbearance*, CCB/CPD No. 96-3, *Time Warner Communications Petition for Forbearance*, CCB/CPD No. 96-7, *Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, CC Docket No. 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 97-219 (rel. June 19, 1997). We note that there are two exceptions to our complete detariffing policy, which permits permissive detariffing for: (1) interstate, domestic, interexchange direct-dial services which end users access by dialing the carrier's access code; and (2) during the first forty-five days of service to new customers that contact the LEC to choose their presubscribed interexchange carrier ("PIC"). See "*Tariff Recon Order*."

⁹⁰ "The amendments [to Sections 204(a) and 208(b) of the Communications Act of 1934] shall apply only with respect to any charge, classification, regulation, or practice filed on or after one year after the date of enactment of this Act." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 129-130, § 402(b)(4).

⁹¹ See 47 U.S.C. § 160.

⁹² 47 U.S.C. § 254(g).

the Commission.⁹³ It has been our experience that there is generally little exchange of information or discussion of the dispute between parties prior to the filing of a formal complaint and that such exchange of information and discussion of a dispute will often lead to settlement.⁹⁴ We stated in the *Notice* that our intent was to adopt rules or procedures that would promote actions that could either foster the resolution of disputes prior to filing or narrow the scope of the issues to be resolved in formal complaints.⁹⁵

1. Certification of Settlement Attempts

a. The *Notice*

39. We tentatively concluded in the *Notice* that we should require that a complainant certify in its complaint that it discussed, or attempted to discuss, in good faith the possibility of settlement with the defendant carrier's representative(s) prior to filing the complaint, and, further, that failure to comply with this certification requirement would result in dismissal of the complaint.⁹⁶

b. Comments

40. Most commenters support the proposal to require a complainant to certify in its complaint that it discussed, or attempted to discuss, the possibility of settlement with the defendant carrier prior to filing its complaint.⁹⁷ These commenters agree that settlement should be encouraged and that the certification requirement would provide an additional incentive for parties to settle or narrow disputed issues, thereby resulting in fewer and better-focused complaints.⁹⁸ GST, KMC, MFS, and TRA additionally suggest that answers should be required to contain certification that the parties discussed, or attempted to discuss, the possibility of settlement prior to the filing of the formal complaint.⁹⁹ In their

⁹³ *Notice* at 20834.

⁹⁴ *Notice* at 20834.

⁹⁵ *Notice* at 20834.

⁹⁶ *Notice* at 20835.

⁹⁷ See, e.g., Association of Telemessaging Services International ("ATSI") Comments at 6; Bell Atlantic Comments at 2-3; BellSouth Comments at 6; NYNEX Comments at 2-4; Pacific Telesis Group ("PTG") Comments at 4; Sprint Comments at 4; United States Telephone Association ("USTA") Comments at 3.

⁹⁸ See, e.g., America's Carriers Telecommunications Association ("ACTA") Comments at 2; ATSI Comments at 6; CBT Comments at 5; GST Telecom, Inc. ("GST") Comments at 2-3; GTE Comments at 2; ICG Telecom Group ("ICG") Comments at 3; Joint Reply of Jones Intercable, Inc., Centennial Cellular Corp., Texas Cable and Telecommunications Association, Cable Television Association of Georgia, South Carolina Cable Television Association, Tennessee Cable Telecommunications Association ("Cable Entities") at 5; KMC Telecom, Inc. ("KMC") Comments at 3; MFS Communications Co., Inc. ("MFS") Comments at 2; Southwestern Bell Telephone ("SWBT") Comments at 1-2; TRA Comments at 10.

⁹⁹ GST Comments at 2-3; KMC Comments at 2; MFS Comments at 2; TRA Comments at 10.

Joint Reply, the cable entities recommend mirroring the Commission's pole attachment procedures,¹⁰⁰ which require a complaint to either summarize all steps taken to resolve the dispute prior to filing or explain why no steps were taken.¹⁰¹ AT&T opposes such a pre-certification requirement, arguing that it would unduly restrict a party's "unconditional statutory right" to file a Section 208 complaint, citing *AT&T v. FCC*¹⁰² as support for its proposition.¹⁰³ BellSouth disagrees with AT&T, arguing that there is no Section 208 right to file a complaint that is not based on facts, and that encouraging pre-complaint negotiations will facilitate all parties' understanding of the facts.¹⁰⁴ Bell Atlantic, NYNEX, and PTG also disagree with AT&T's argument, stating that *AT&T v. FCC* deals only with the Commission's prohibition of tariff revisions for certain services and does not deal with Section 208 complaints.¹⁰⁵ CompTel opposes the requirement of certification of settlement attempts, arguing that parties already have sufficient motivation to settle their disputes and that mandatory settlement discussions might force some parties to accept unfavorable settlements.¹⁰⁶

c. Discussion

41. We conclude that both the complainant and defendant, as part of the complaint and answer, respectively, must certify that they discussed, or attempted in good faith to discuss, the possibility of settlement with the opposing party prior to the filing of the complaint.¹⁰⁷ We agree with GST, KMC, MFS, and TRA that defendant carriers should be given equal responsibility for exploring settlement options prior to the filing of a formal complaint. To help facilitate meaningful discussion between disputing parties, we will adopt a requirement that the complainant mail a certified letter outlining the allegations that form the basis of the complaint it anticipates filing with the Commission to the defendant carrier that invites a response within a reasonable period of time. We further conclude that the rule setting forth the certification requirement shall be modeled on the Commission's existing pole attachment procedures in Section 1.1404(i) of the rules.¹⁰⁸ Therefore, each settlement certification must include a brief summary of all steps taken to resolve the dispute prior to filing. If no steps are taken, then each such certification must state the reason(s) for such failure to conduct settlement discussions. We find that mandating settlement discussions prior to filing a formal complaint will result in (1) more disputes being settled amicably, and (2) the scope of the issues in dispute in formal complaints being narrowed where possible.

¹⁰⁰ See 47 C.F.R. § 1.1404(i).

¹⁰¹ Cable Entities Joint Reply at 5.

¹⁰² 487 F.2d 865 (2d Cir. 1973).

¹⁰³ AT&T Comments at 6.

¹⁰⁴ BellSouth Reply at 4-5.

¹⁰⁵ Joint Reply of Bell Atlantic and NYNEX at 3-4; PTG Reply at 5-6.

¹⁰⁶ CompTel Comments at 3.

¹⁰⁷ See Appendix A, §§ 1.721(a)(8); 1.724(h).

¹⁰⁸ See Appendix A, §§ 1.721(a)(8); 1.724(h).

42. We disagree with CompTel's assertion that a rule requiring mandatory settlement discussions could be used to coerce parties into accepting unfavorable settlements. This rule requires good faith settlement *attempts*, not settlement itself. Furthermore, requiring good faith settlement attempts will not impose undue restrictions on the right of any person to file a complaint with the Commission. We disagree with AT&T's interpretation of the ruling in *AT&T v. FCC*¹⁰⁹ as it applies to the issues under consideration here. In *AT&T v. FCC*, the court held that the Commission's requirement that a carrier obtain special permission, *i.e.*, prior Commission approval, before filing a tariff under Section 203 unlawfully interfered with the carrier's right to file a tariff.¹¹⁰ In addition to the fact that *AT&T v. FCC* considers the application of Section 203, not Section 208, the issue considered in *AT&T v. FCC* is distinguishable from the issue before us in that the pre-filing requirements we impose here only dictate that parties explore settlement possibilities and do not require any Commission approval prior to filing a formal complaint. If settlement attempts are unsuccessful, the complainant is free to file a formal complaint. The certification requirement will benefit the parties and the Commission by requiring the parties to discuss the facts and issues in dispute prior to the filing of the complaint. Such requirement may, therefore, lead to an informal resolution of the dispute or, at the very least, may reduce or clarify the number and scope of the issues in dispute, consistent with Congress' intent to expedite the resolution of disputes.

2. Neutral Industry Committee

a. The Notice

43. We also sought comment on whether a committee composed of neutral industry members would serve a needed role or useful purpose in addressing disputes over technical and other business disputes, before parties bring their disputes to the Commission in the form of formal complaints.¹¹¹ We asked commenters to address the extent to which there would be a need for outside experts to deal with technical issues that are likely to arise in formal complaints and whether, if such a need exists, the use of a committee of such experts in the form of a voluntary preliminary alternative dispute resolution ("ADR") procedure would expedite the resolution of complaints.¹¹²

¹⁰⁹ *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973).

¹¹⁰ *AT&T v. FCC*, 487 F.2d 865, 869.

¹¹¹ *Notice* at 20835.

¹¹² *Notice* at 20835.

b. Comments

44. Most commenters oppose the creation of an industry committee.¹¹³ Several parties argue that it would be impossible to construct a neutral committee,¹¹⁴ PTG and TRA argue that the use of such a committee would delay the resolution of important marketplace issues,¹¹⁵ and AT&T and GTE argue that the committee would lack the expertise to handle a wide variety of disputes.¹¹⁶ CBT, Communications and Energy Dispute Resolution Associates ("CEDRA"), and NYNEX contend that such options are already available to parties.¹¹⁷ NYNEX additionally states that complaints before the Commission typically involve disputes between individual companies, rather than broad issues affecting the industry.¹¹⁸ Some commenters, however, support the proposal. ATSI, BellSouth, SWBT, and USTA support the use of an industry committee to assist in resolving technical and business disputes.¹¹⁹ BellSouth added that an industry committee could be used in conjunction with ADR mechanisms.¹²⁰ ATSI asserts that committee proceedings would have to be completed within clearly established deadlines to prevent delay in resolving disputes involving competitive issues and to ensure compliance with the statutory complaint resolution deadlines.¹²¹ In addition, GST, KMC, and MFS suggest permitting the parties and the Commission to utilize such a committee during the complaint process, as well as at the pre-filing stage, to resolve certain factual issues.¹²²

c. Discussion

45. We decline to establish a committee of neutral industry members to resolve disputes over technical and other business issues, before parties file such disputes with the Commission as formal

¹¹³ AT&T Comments at 4 n.3; CBT Comments at 6; GST Comments at 3; GTE Comments at 3; KMC Comments at 3; MFS Comments at 3; PTG Comments at 5-6; TRA Comments at 10-11.

¹¹⁴ CBT Comments at 6; GST Comments at 3; KMC Comments at 3; MFS Comments at 3; PTG Comments at 5-6; TRA Comments at 10-11.

¹¹⁵ PTG Comments at 5-6; TRA Comments at 10-11.

¹¹⁶ AT&T Comments at 4 n.3; GTE Comments at 3.

¹¹⁷ CBT Comments at 6; CEDRA Comments at 5-6; NYNEX Comments at 4. NYNEX states, for example, that carriers already have access to industry forums such as the Carrier Liaison Committee and the Network Interconnection/Interoperability Forum to discuss technical issues and develop industry standards. NYNEX Comments at 4.

¹¹⁸ NYNEX Comments at 4.

¹¹⁹ ATSI Comments at 7; BellSouth Comments at 7-8; SWBT Comments at 2; USTA Comments at 6.

¹²⁰ BellSouth Comments at 7-8.

¹²¹ ATSI Comments at 7.

¹²² GST Comments at 4; KMC Comments at 3; MFS Comments at 3-4.

complaints. We note that the majority of commenters oppose this proposal.¹²³ Several factors weigh against establishing such a committee. First, because the committee's decisions would not be binding on the Commission, it is possible that the committee and the Commission might rule differently on identical issues. The usefulness of committee decisions to resolve disputes would be diminished by such uncertainty, as a losing party would have little incentive to accept the committee's recommendation. Second, we agree with commenters that it would be difficult to establish a standing committee with sufficient expertise to resolve a range of technical and business issues because of the breadth of knowledge and expertise that would be required. Third, we agree with commenters that it would be administratively burdensome to assemble a new committee for each conflict parties sought to submit to such committee. Finally, we agree with the commenters who argue that the potential for conflicts of interest among the committee members is too great to be able to provide a guarantee of neutrality.

3. Additional Commenters' Suggestions

a. The Notice

46. In the *Notice*, we invited commenters to suggest additional pre-filing requirements or procedures to help settle or narrow disputes, or facilitate the compilation and exchange of relevant documentation or other information.¹²⁴

b. Comments

47. ATSI, NYNEX, and USTA suggest that formal ADR efforts be made a prerequisite to filing a complaint,¹²⁵ while MCI and Sprint oppose such a proposal.¹²⁶ MCI, ICG, and Sprint suggest that parties be required to begin their information exchange before a complaint is filed, in order to prepare for the rapid pace of the complaint process.¹²⁷ PTG opposes this suggestion, arguing that requiring such information exchanges would lead to fishing expeditions and raise confidentiality concerns.¹²⁸ Bell Atlantic proposes that a potential complainant be required to provide the defendant carrier with a statement of its claim and specify documents and information that it believes would be material to the resolution of the dispute, and that the carrier be required to respond in full within a reasonable period of time before a complaint is filed.¹²⁹ Similarly, CEDRA and BellSouth suggest that complainants be required to serve

¹²³ AT&T Comments at 4 n.3; CBT Comments at 6; GST Comments at 3; GTE Comments at 3; KMC Comments at 3; MFS Comments at 3; PTG Comments at 5-6; TRA Comments at 10-11.

¹²⁴ *Notice* at 20835.

¹²⁵ ATSI Comments at 7; NYNEX Comments at 3; USTA Comments at 6.

¹²⁶ See MCI Reply at 5-6; Sprint Reply at 4.

¹²⁷ MCI Comments at 6-8; ICG Comments at 5; Sprint Reply at 4.

¹²⁸ PTG Reply at 3-4.

¹²⁹ Bell Atlantic Comments at 2-3.

advance copies of their complaints on defendant carriers prior to filing such complaints with the Commission.¹³⁰ Finally, CompTel, Nextlink and various cable entities suggest that the Commission offer binding arbitration or mediation as an alternative to formal complaints, arguing that Commission staff would be more persuasive and knowledgeable than outside mediators or arbitrators.¹³¹

c. Discussion

48. We decline to adopt these proposals because, for the most part, they raise potential problems that would outweigh their potential benefits. We reject suggestions that would impose rigid requirements for pre-filing activities. We find that these proposals could either stifle the parties' ability to develop creative solutions to their differences or delay unnecessarily the filing of complaints, or both. For example, we agree with MCI and Sprint that requiring formal ADR efforts prior to the filing of a formal complaint could permit defendant carriers to delay the filing of formal complaints to the detriment of customers and competitors alike. For the same reason, we reject the suggestions by MCI, ICG, and Sprint that we should mandate the exchange of documents and materials by potential complainants and defendant carriers prior to the filing of a formal complaint. Although the proposals of Bell Atlantic, BellSouth, and CEDRA, to require the exchange of specific information identifying claims and key facts in advance of the filing of the formal complaint, would promote pre-filing discussions, we conclude that parties should be afforded the widest possible latitude in conducting their settlement efforts and not be subjected to rigid requirements. We also reject the proposals of CompTel, Nextlink, and the cable entities to require the Commission to arbitrate or mediate disputes at the request of the disputing parties as an alternative to formal complaints. Such a requirement would unnecessarily tax the Commission's resources when there are many qualified ADR experts outside the Commission. We note that Commission staff will work with industry members and formal complaint parties to resolve disputes informally, both before and after formal complaints have been filed. We see little benefit, however, in requiring the staff to conduct such mediation or arbitration efforts in all cases.

D. Service

49. Under Section 208 of the Act and the Commission's existing complaint rules, the staff is responsible for serving formal complaints on defendant carriers.¹³² Currently, all formal complaints must be initially filed with the Mellon Bank in Pittsburgh, Pennsylvania; forwarded by the Bank to the Commission's Secretary; and then distributed to the Common Carrier Bureau. The Common Carrier Bureau then forwards complaints against common carriers and complaints against international telecommunications providers to the Common Carrier Bureau's Enforcement Division; complaints against wireless carriers are forwarded to the Wireless Telecommunications Bureau.¹³³ As a result, ten days or more may pass before the staff receives official copies of a complaint, reviews it for minimum compliance

¹³⁰ CEDRA Comments at 2; BellSouth Reply at 7.

¹³¹ Comptel Comments at 4-5; Nextlink Comments at 2-5; Cable Entities Joint Reply at 5 n.3.

¹³² See 47 U.S.C. § 208(a); 47 C.F.R. § 1.47(b).

¹³³ We note that the Common Carrier Bureau coordinates extensively with the International Bureau to process international telecommunications complaints. The Common Carrier Bureau and the Wireless Telecommunications Bureau utilize the same complaint procedures detailed in Sections 1.720-1.735 of the Commission's rules to process complaints.

with the rules, and serves it on the defendant carrier(s). It has been common for a defendant carrier to receive a complaint twenty days after it was filed with the Commission. Pleadings filed subsequent to the complaint are currently served by regular U.S. mail, which may delay actual receipt of such pleadings from three days to a week. Because of the new ninety to 120-day statutory deadlines, the *Notice* proposed to eliminate delays associated with the current filing and service procedures by streamlining the service process.¹³⁴

1. Personal Service of Formal Complaints on Defendants

a. The *Notice*

50. In the *Notice* we sought comment on our proposals to modify the service of formal complaints.¹³⁵ We proposed to authorize or require a complainant to effect service simultaneously on the following persons: the defendant carrier, the Commission, and the appropriate staff office at the Commission, *i.e.*, the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau; the Chief, Compliance and Litigation Branch, Enforcement and Consumer Information Division, Wireless Telecommunications Bureau; or the Chief, Telecommunications Division, International Bureau.¹³⁶ With regard to service on the defendant, we proposed that a complainant would personally serve the complaint on an agent designated by the defendant carrier to receive such service.¹³⁷ We proposed that the answer period would begin to run once the complaint has been served by the complainant on the defendant.¹³⁸

51. We also noted that requiring complainants to serve complaints directly on defendants would eliminate the staff's initial review of the complaint prior to the defendant's receipt of the complaint.¹³⁹ To alleviate concerns about service of deficient complaints, the *Notice* proposed to require that parties submit a completed checklist or "intake" form with each copy of the formal complaint to indicate: (1) that the complaint satisfies minimum format and content requirements; (2) that the complaint meets the various threshold requirements for stating a cause of action under the Act and the Commission's rules; and (3) the statutory provisions allegedly violated and any applicable statutory resolution deadline.¹⁴⁰ We based this proposal on our belief that such an intake form could be a useful tool both to speed the preparation and filing of complaints and to avoid or reduce the time and resources involved in processing procedurally defective or substantively insufficient complaints.¹⁴¹ We further noted that the intake form

¹³⁴ *Notice* at 20835.

¹³⁵ *Notice* at 20835.

¹³⁶ *Notice* at 20835-36.

¹³⁷ *Notice* at 20835.

¹³⁸ *Notice* at 20835.

¹³⁹ *Notice* at 20837-38.

¹⁴⁰ *Notice* at 20837-38.

¹⁴¹ *Notice* at 20837-38.